

GLENN B. MANISHIN
Partner
202.274.2890 telephone
202.274.2994 facsimile
glenn.manishin@troutmansanders.com

TROUTMAN SANDERS

TROUTMAN SANDERS LLP
Attorneys at Law
401 9th Street, N. W., Suite 1000
Washington, D.C. 20004-2134
202.274.2950 telephone
troutmansanders.com

November 28, 2012

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Re: *U.S. South Communications, Inc., Notice of Ex Parte Presentation*
WC Docket No. 11-141

Dear Ms. Dortch:

On November 27, 2012, the undersigned counsel and Bradley L. Cooper, Associate General Counsel-Litigation of InComm Holdings, Inc., parent company to U.S. South Communications, Inc., met separately with (a) Priscilla Argeris of Commissioner Rosenworcel's office, (b) Angela Kronenberg of Commissioner Clyburn's office, and (c) Nicholas Degani of Commissioner Pai's office, to discuss the pending Application For Review (AFR) in the captioned primary jurisdiction proceeding.

U.S. South summarized the arguments presented in the AFR and its reply comments in support thereof, emphasizing that this matter presents important issues of the Commission's continued commitment to a market-based solution for payphone services, achieving the statutory objective of widespread deployment of payphones, and the FCC's relations with the coordinate branches of the federal government. U.S. South observed that the resolution reached in the June 29, 2012 *Declaratory Ruling* by the Chief, Wireline Competition Bureau (DA 12-1046) represents poor public policy for end users, especially vulnerable minority, low-income and immigrant communities, which disproportionately use prepaid cards from payphones. The inevitable result of the strict liability rule fashioned as a matter of first impression by the Bureau in this proceeding is that payphone service providers (PSPs) will have absolutely no incentive to negotiate consensual compensation arrangements while interexchange carriers (IXCs), conversely, will have a powerful incentive to block all payphone traffic, which they are expressly permitted to do under the Commission's 1996-2002 orders implementing per-call payphone compensation.

The attached outline was provided to the attendees, along with a copy the district court's recent memorandum decision. *GCB Comms., Inc. v. U.S. South Comms., Inc.*, Order, No. 07-cv-02054-SRB (D. Ariz. Oct. 23, 2012). That order declined to adopt the *Declaratory Ruling* on the

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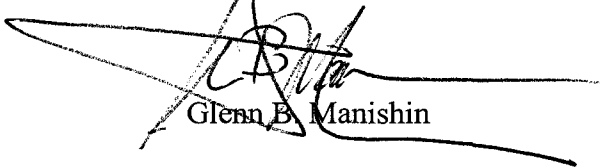
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ground that until a staff interpretation is “adopted, amended or rescinded” by the full Commission, reliance on such a non-final delegated authority disposition is “premature” under section 155(c)(1) of the Act and *International Telecard Assn. v. FCC*, 166 F.3d 387, 388 (D.C. Cir. 1999), representing “a needless waste of judicial resources.”

Copies of both documents are attached for inclusion in the record of this proceeding and, as required by the Commission’s rules, a copy of this notice has been sent via email to each of the FCC staff with whom the U.S. South representatives met.

Please do not hesitate to contact me if you have any questions or require additional information in connection with the foregoing.

Sincerely,

A handwritten signature in black ink, appearing to read "G. B. Manishin", is written over a horizontal line. The signature is stylized with a large, sweeping initial "G".

Glenn B. Manishin

Enclosures

cc: Priscilla Argeris
Angie Kronenberg
Nick Degani

WC Docket No.11-141 (Primary Jurisdiction Referral)

1. Proceeding presents important issues of (a) the Commission's continued commitment to a market-based solution for payphone services, (b) achieving statutory objective of widespread deployment of payphones, and (c) FCC's relations with coordinate branches of federal government. AFR currently pending before full Commission.
2. Former WCB Chief decided conceded legal question of first impression on delegated authority. District court (D. Ariz.) then refused to apply that staff decision on ground it is not final FCC action per 155(c)(7) and *International Telecard Assn. v. FCC*, 166 F.3d 387, 388 (D.C. Cir. 1999). *Parties will remain in limbo until Commission acts in this matter.*

Because Defendant has filed a petition for review by the FCC, it would be premature for the Court to enter a final judgment based on its reading of an interpretation that the FCC has not yet "adopted, amended, or rescinded." *Int'l Telecard*, 166 F.3d at 388 (quoting 47 U.S.C. § 155(c)(1)). Doing so would risk the Court entering a final judgment based on an interpretation the FCC later rejects, thereby forcing the Court to act to alter its prior judgment, which would be a needless waste of judicial resources. *See Wade v. FCC*, 986 F.2d 1433, 1434 (D.C. Cir. 1993) ("The danger of wasted judicial effort that attends the simultaneous exercise of judicial and agency jurisdiction arises whether a party seeks agency reconsideration before, simultaneous with, or after filing an appeal or petition for judicial review." (citation omitted)).

3. *Declaratory Ruling* contradicts Commission's payphone policies and its own series of payphone orders. WCB offers precious little logic and no explanation for why FCC itself, from first 1996 order, required that "payphone specific coding digits" be "generated and transmitted" with calls. Had \$0.494 per-call "default" rate been due without regard to Flex-ANI, as WCB now asserts, there would have been no need for CCB to have specifically ordered per-call payments before Flex-ANI was fully operational. *Undermines FCC's statutory duty to promote "widespread" payphone deployment because it incentivizes even more major IXCs, and most prepaid providers, to exit payphone market.*
4. Evident that Flex-ANI must accompany each payphone call because, as the Ninth Circuit reasoned, "the whole purpose of the Flex-ANI system was to implement a practical way for completing carriers to determine that a call was from a PSP." 650 F.3d at 1266. Since the Commission itself has emphasized that an "accurate" system under Section 64.1310(a)(1) does not need to be perfect, there is no basis to assert that failure to accurately track "each and every" payphone call to completion is *per se* unreasonable under Section 276. *WCB's strict liability rule applies all financial exposure for network failure to IXC when there is no proof of fault/noncompliance and where PSPs has damages remedy against serving LEC.*
5. "Primary economic beneficiary" rationale does not justify unfair burden on IXCs they cannot avoid with even careful diligence. *AT&T*: "[T]he IXC has no way to distinguish

between a Flex ANI failure and any number of other reasons that payphone-specific coding digits are not transmitted with a particular call. Accordingly, there would be nothing to alert a Completing Carrier to any problem with Flex ANI.” FCC: “Section 276 requires us to ensure that per-call compensation is fair, which implies fairness to both sides.” Fifth Order on Reconsideration, 17 FCC Rcd. at 21302-03 ¶ 82 (2002).

6. Consequences are significant in making entire Flex-ANI investment (integral to shift from per-phone comp.) irrelevant. *Sprint*: “GCB has asked the FCC to interpret its rules so as to eliminate a system that took years and significant resources to establish and that provides the completing carriers an efficacious way to ensure that the call is from a payphone.”
7. Poor public policy for end users, especially vulnerable minority, low-income and immigrant communities, which disproportionately use prepaid cards from payphones. The inevitable result of a strict liability rule is that PSPs will have absolutely no incentive to negotiate consensual compensation arrangements while IXC’s, conversely, will have a powerful incentive to block all payphone traffic. *Prepaid carriers like U.S. South will have little choice to block payphone traffic because the “default” charge must be debited in real-time, which is impossible without Flex-ANI, as profit margins are razor thin.* ** APPPA members began blocking prepaid calling from nearly 8,000 payphones in just the 1st three months after WCB’s *Declaratory Ruling*.
8. Internal FCC approach to primary jurisdiction desperately needs to be settled. Bureaus do not and should not have delegated power to decide novel questions referred by federal courts. Inconsistent with 47 C.F.R. §§ 0.91(b), 0.291(a)(2) and with comity to judiciary. Places parties in “catch-22” situation with duplicative appeals under vastly different procedures. FCC should issue “delegation order” if – as in this case without request by any party for staff-based decision – it wants primary jurisdiction cases resolved by Bureaus (as in *Connect America Fund* order).
9. Section 206 damages suits in federal court for payphone compensation are oxymorons. Costs of defense dwarf amount in controversy and create “greenmail” settlement leverage without regard to merits. FCC should not only reverse *Declaratory Ruling* but should require exhaustion of administrative remedies (audit challenges, etc.) before permitting suits for allegedly unpaid compensation.

** True even for international calls, where prices are relatively high, because the termination costs in many countries includes inflated access and regulatory charges imposed by national carriers and PTTs.

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GCB Communications, Inc., an Arizona
corporation d/b/a Pacific Communications;
Lake Country Communications, Inc., a
Minnesota corporation,

Plaintiffs,

vs.

U.S. South Communications, Inc., a
Georgia corporation

Defendant.

No. 07-CV-2054-PHX-SRB

ORDER

Before the Court is Plaintiffs' Motion for Entry of Final Judgment ("Pls.' Mot.")
(Doc. 133).

I. BACKGROUND

At issue is whether Defendant was required to pay Plaintiffs for completed coinless payphone calls (referred to as "dial-around" calls) if Defendant did not receive coding digits that would identify the calls as coming from Plaintiffs' phones. The Court originally decided this case in favor of Plaintiffs based on its conclusion that Defendant had the burden of tracing "dial-around" phone calls to payphones and that Defendant was therefore required to compensate Plaintiffs for such calls originating from its payphones "regardless of whether the proper Flex-ANI digits were transmitted." (Doc. 77, Findings of Fact, Conclusions of Law, and Order at 12.) This conclusion was overturned by the Ninth Circuit Court of

1 Appeals, which held that “the Flex-ANI digits must . . . be transmitted in the first place.” *GCB*
 2 *Commc’ns, Inc. v. U.S. S. Commc’ns, Inc.*, 650 F.3d 1257, 1265 (9th Cir. 2011). The Ninth
 3 Circuit Court of Appeals remanded the case to this Court leaving open the possibility that the
 4 Court could “revisit[] and reconsider[] the question of whether the primary jurisdiction
 5 doctrine should be applied to this case, especially in view of the fact that there has been some
 6 difficulty in determining the proper construction of the FCC’s orders.” *Id.* at 1268, n.20.

7 The parties then consented to primary jurisdiction with the Federal Communications
 8 Commission (“FCC”) and the Court referred the matter to the FCC

9 for its declaratory judgment ruling on the following issue: If the Payphone
 10 Service Provider (“PSP”) has ordered a payphone line from the serving Local
 11 Exchange Carrier (“LEC”), is the completing carrier obligation to pay the PSP
 12 per-call compensation for completed coinless calls made from that payphone
 line, and the PSP has no responsibility for the transmission and receipt of
 payphone-specific coding digits by the carriers in the call path.

13 (Doc. 123, July 6, 2011, Order at 1-2.) The Court also stayed the matter until the FCC
 14 adjudicated the issue and ordered the parties to promptly notify it when the FCC had issued
 15 a ruling. (*Id.* at 2) Plaintiffs filed a Notice of Declaratory Ruling by FCC with this Court on
 16 July 27, 2012, and attached a copy of the Declaratory Ruling written by the Chief of the
 17 Wireline Competition Bureau (“WCB”) on June 29, 2012, as Exhibit A. (*See* Doc. 132,
 18 Plaintiffs’ Notice of Declaratory Ruling by FCC (“Pls.’ Notice”); *id.*, Ex. A, Declaratory
 Ruling (“Decl. Rul.”).)

19 The parties agree that the Declaratory Ruling found that “a Completing Carrier’s
 20 obligation to pay per-call payphone compensation is not contingent on whether it receives
 21 payphone-specific coding digits.” (Decl. Rul. at 1-2; *see also* Pls.’ Mot. at 2; Doc. 139, Am.
 22 Resp. of Def. U.S. S. Commc’ns, Inc. in Opp’n to Pls.’ Motion (“Def.’s Resp.”) at 2.) Based
 23 on this finding, Plaintiffs now seek an Order from this Court entering final judgment in their
 24 favor, lifting the stay of proceedings, and awarding damages, attorneys’ fees, and taxable
 25 costs. (Pls.’ Mot. at 2.)

26 **II. LEGAL STANDARDS AND ANALYSIS**

27 Plaintiffs argue that the effect of the Declaratory Ruling is that “this Court need not
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1 take any further evidence or conduct any further proceedings in order to end this case.
2 Rather, the Court need only enter a final judgment in Plaintiffs' favor incorporating the
3 Court's prior award[s]." (Pls.' Notice at 6.) Defendant argues that the Court should not enter
4 a final judgment on the basis of the Declaratory Ruling for several reasons: 1) the Ruling "is
5 not final agency action since . . . adoption by the full FCC is a 'condition precedent' to
6 judicial review"; 2) if the Ruling is a final order from the FCC, "[j]udicial review . . . is
7 confined to the federal courts of appeals"; 3) if this Court does have jurisdiction, it must
8 "review the WCB reasoning and consider whether it merits judicial deference" prior to
9 entering a final judgment to avoid violating Article III of the United States Constitution; 4)
10 accepting the Ruling would violate Defendant's Fifth Amendment due process rights by
11 abrogating its right to examine the WCB Chief as an expert witness; 5) there are remaining
12 outstanding issues that the Court must resolve before entering a final judgment, including the
13 proper interest rate to be applied to the award and the proportionality of attorneys' fees; and
14 6) the original Complaint fails to state a claim. (Def.'s Resp. at 2-14.)

15 The Court will first address Defendant's argument that the Declaratory Ruling is not
16 a final agency action. Defendant has filed a petition for full agency review of the WCB
17 Chief's Ruling. (*Id.* at 2.) Defendant argues that "[a] federal district court making a primary-
18 jurisdiction referral should . . . require a final decision by the administrative agency, not an
19 interlocutory ruling by a single member of its staff." (*Id.* at 6.) Defendant cites 47 U.S.C. §
20 155(c)(7) and *International Telecard Association v. FCC*, 166 F.3d 387, 388 (D.C. Cir. 1999)
21 in support of this proposition. (Def.'s Resp. at 5.) Plaintiffs respond that under 47 C.F.R. §
22 1.102(b)(3), "unless and until the commission stays the effectiveness of the Declaratory
23 Ruling or otherwise modifies it, the Declaratory Ruling is the official Commission position
24 on the issues resolved thereby and is fully in effect and binding on all parties." (Doc. 142,
25 Pls.' Reply in Supp. of Pls.' Mot. ("Pls.' Reply") at 5.)

26 "The filing of an application for review . . . shall be a condition precedent to judicial
27 review of any order, decision, report, or action made or taken pursuant to a delegation [by
28 the FCC.]" 47 U.S.C. § 155(c)(7). "[A] petition for review filed after a bureau decision but

1 before resolution by the full Commission is subject to dismissal as incurably premature.
 2 Ongoing agency review renders an order nonfinal for purposes of judicial review.” *Int’l*
 3 *Telecard*, 166 F.3d at 388; *see also Richman Bros. Records, Inc. v. F.C.C.*, 124 F.3d 1302,
 4 1303-04 (D.C. Cir. 1997). While Plaintiffs may not be seeking judicial review in the
 5 traditional sense of an appeal of the Declaratory Ruling, the parties agree that the Court must
 6 review the legal sufficiency of the Declaratory Ruling before making a determination in this
 7 case. (Pls.’ Reply at 3; Def.’s Resp. at 4.) Because Defendant has filed a petition for review
 8 by the FCC, it would be premature for the Court to enter a final judgment based on its
 9 reading of an interpretation that the FCC has not yet “adopted, amended, or rescinded.” *Int’l*
 10 *Telecard*, 166 F.3d at 388 (quoting 47 U.S.C. § 155(c)(1)).¹ Doing so would risk the Court
 11 entering a final judgment based on an interpretation the FCC later rejects, thereby forcing the
 12 Court to act to alter its prior judgment, which would be a needless waste of judicial
 13 resources. *See Wade v. FCC*, 986 F.2d 1433, 1434 (D.C. Cir. 1993) (“The danger of wasted
 14 judicial effort that attends the simultaneous exercise of judicial and agency jurisdiction arises
 15 whether a party seeks agency reconsideration before, simultaneous with, or after filing an
 16 appeal or petition for judicial review.” (citation omitted)).

17 Since Defendant has established that the Court cannot take action regarding the
 18 effect of the Declaratory Ruling because it is non-final, the Court need not address
 19 Defendant’s remaining arguments.

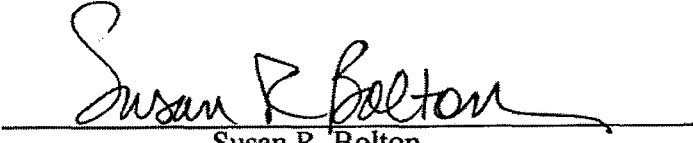
20 **III. CONCLUSION**

21
 22 ¹ Plaintiffs’ reliance on 47 C.F.R. § 1.102(b)(3) is misplaced. While it is true that the
 23 FCC has discretion under that regulation to decide whether to stay the effect of an action
 24 made pursuant to its delegated authority, the Declaratory Ruling here has no immediate effect
 25 that could be stayed. Unlike the situations in the cases Plaintiffs cite, the Declaratory Ruling
 26 creates no immediate rights for either party, such as the granting or withholding of a license.
 27 *See In re A-O Broad. Corp.*, 23 F.C.C.R. 603, 614-15 (2008) (stating that a radio station was
 28 not entitled to continue operating while review of an agency decision denying a broadcasting
 license was pending); *In re Airgate Wireless, LLC*, 15 F.C.C.R. 13557, 13561 (2000) (finding
 that a party had the right to rely on an order allowing it to obtain a license pending review
 of that order). The Declaratory Ruling offers only the FCC’s interpretation of its own
 regulations—it does not establish any rights. Thus, 47 C.F.R. § 1.102(b)(3) does not apply.

1 Plaintiffs' Motion for Entry of Final Judgment is not yet ripe because the FCC has not
2 issued a final order for the Court to apply.

3 **IT IS ORDERED** denying Plaintiffs' Motion for Entry of Final Judgment (Doc. 133).
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5 DATED this 23rd day of October, 2012.
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9 Susan R. Bolton
United States District Judge
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